UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID MILLER,	:	
	:	
Petitioner,	:	**OPINION AND ORDER**
	:	
- against –	:	**00 Civ. 2469 (SAS)**
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

SHIRA A. SCHEINDLIN, U.S.D.J.:

On November 1, 1999, pro se petitioner David Miller was sentenced to 78 months in custody, a three year period of supervised release and a $700 mandatory assessment on his conviction for five counts of bank robbery and two counts of armed bank robbery. Miller now seeks to vacate his sentence pursuant to 28 U.S.C. § 2255.

The Government opposes the motion, maintaining that Miller expressly waived his right to bring a § 2255 motion in the negotiated plea agreement he entered. The Government further argues that the Court did not invalidate this waiver by informing petitioner, at his sentencing, of a general right to appeal his sentence. For the reasons set forth below, petitioner's motion to vacate is denied.

I. BACKGROUND

Petitioner is a 45-year-old college graduate with two years of post-graduate education and experience working as a paralegal at the U.S. Labor Department. See 7/28/99 Transcript

of Guilty Plea, United States v. Miller, before Honorable Theodore H. Katz ("Plea Hearing") at 5; 11/1/99 Transcript of Sentencing in United States v. Miller before Honorable Shira A. Scheindlin ("Sentencing Hearing") at 10. On May 25, 1999, Miller was apprehended and arrested by officers from the New York City Police Department for armed robbery of the 62nd Street branch of the Bank of New York. Complaint for Violation of 18 U.S.C. § 2113 (a) and (d) ("Complaint") ¶ 2.

Having been informed of his constitutional rights, petitioner confessed not only to the robbery he had just committed, but also to the robberies of four other banks in New York and two other banks in Washington, D.C. Id. ¶¶ 2-3. Charged with five counts of bank robbery in violation of 18 U.S.C. § 2113(a) and two counts of armed bank robbery, in violation of 18 U.S.C. § 2113(d), petitioner pled guilty to all counts pursuant to a plea agreement with the United States Attorney's Office.[1] See 7/19/99 Letter to Philip Weinstein, defendant's attorney, from Assistant United States Attorney Michael McGovern ("Plea Agreement"), Ex. A to Memorandum of Law in Opposition to David Miller's Petition Pursuant to 28 U.S.C. § 2255 ("Opp. Mem."), at 1; Plea Hearing at 5. The plea agreement

[1] In exchange for petitioner's guilty plea, the two offenses committed in Washington, D.C. and the offenses committed in New York were consolidated into a single plea agreement and sentencing proceeding thereby permitting petitioner to avoid the risk of consecutive sentences. Sentencing Hearing at 21.

stated that petitioner would neither appeal, nor otherwise litigate under 28 U.S.C. § 2255, any sentence within or below the stipulated sentencing range of 78 to 97 months imprisonment, even if the Court employed a different Guidelines analysis. Plea Agreement at 4-5.

During the plea hearing before Magistrate Judge Katz on July 28, 1999, petitioner was asked, "[H]ave you read and signed the plea agreement" and "do you know what it says." Miller responded affirmatively to both inquiries. Plea Hearing at 9. At the direction of Magistrate Judge Katz, the Assistant United States Attorney outlined the terms of the plea agreement for the record, stating that petitioner "waives his right to appeal any sentence that is imposed within or below the stipulated guidelines range." Id. at 10. After verifying with Miller's attorney that these were, in fact, the terms of the agreement, Magistrate Judge Katz asked: "Mr. Miller, do you understand the terms of the agreement?" Id. Miller responded: "Yes, I do." Id.

On November 1, 1999, petitioner was sentenced to 78 months in custody, a three year period of supervised release, and a $700 mandatory assessment. Sentencing Hearing at 27-28. After the sentence was imposed, the Court stated:

> Mr. Miller, you have the right to appeal this sentence imposed on you. If you cannot pay the cost of appeal, you have the right to apply for leave to appeal in forma pauperis. If you request, the Clerk will prepare and file a notice of appeal on your behalf immediately.

Sentencing Hearing at 28.

Petitioner now seeks to vacate the sentence under 28 U.S.C. § 2255 claiming that he was denied effective assistance of counsel. See Memorandum of Law and Facts in Support of Motion for Correction of Sentence ("Pet. Mem.") at 2. Miller argues that he is not precluded from moving to vacate his sentence as the waiver of the right to file a § 2255 motion was not knowing, because he did not understand its consequences. Furthermore, petitioner claims that this Court told him he had the right to appeal his sentence and that this invalidated any previous waiver of such rights. Id. at 1-2.

II. DISCUSSION

A. Legal Standard

The Second Circuit has repeatedly recognized that the right to appeal a sentence may be waived as part of a plea agreement. See, e.g., United States v. Garcia, 166 F.3d 519, 521 (2d Cir. 1999); United States v. Rosa, 123 F.3d 94, 97 (2d Cir. 1997). Moreover, waiver of the right to appeal a sentence includes not only direct appeals, but also collateral attacks under 28 U.S.C. § 2255. See United States v. Pipitone, 67 F.3d 34, 39 (2d Cir. 1995); Luna v. United States, 98 Civ. 7970, 1999 WL 767420, at *3 (S.D.N.Y. Sept. 28, 1999)(petitioner explicitly waived his § 2255 rights in the plea agreement).

In order to be valid, however, a waiver must be knowing and voluntary. See United States v. Gomez-Perez, 00 Civ 1036,

2000 WL 771823, at *3 (2d Cir. June 15, 2000). A waiver is knowing if "the defendant fully understood the potential consequences of his waiver." United States v. Ready, 82 F.3d 551, 557 (2d Cir. 1996). Where the record establishes a waiver was knowing and voluntary it will be enforced.

> In no circumstances . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless.

United States v. Salcido-Contreras, 990 F.2d 51, 53 (2d Cir. 1992). In contrast, if the record fails to reflect a knowing and voluntary waiver, it will not be enforced.[2] See Gomez-Perez, 2000 WL 771823, at *4 ("In some cases, a defendant may have a valid claim that the waiver of appellate rights is unenforceable, such as when the waiver was not made knowingly, voluntarily, and competently. . ."); United States v. Tang, 214 F.3d 365, 368 (2d Cir. 2000)(plea agreement not enforced where record did not reflect defendant's understanding of waiver which had two alternative meanings); United States v. Chen, 127 F.3d 286, 289-90 (2d Cir. 1997)(plea agreement not enforced where Magistrate Judge erroneously instructed defendant at plea hearing that he

[2] Additionally, in some circumstances a waiver may be invalid if it affects constitutional rights. See United States v. Jacobson, 15 F.3d 19, 23 (2d Cir. 1994)(refused to find waiver based on arguably unconstitutional use of naturalized status as basis of sentence), United States v. Yemitan, 70 F.3d 746, 748 (2d Cir. 1995)(waiver not upheld where sentence is tainted by racial bias).

could only appeal an illegal sentence and record did not demonstrate defendant's understanding of plea agreement's waiver provision).

B. Petitioner's Waiver Was Knowing and Voluntary

Petitioner's first argument, that he did not knowingly waive his right to appeal his sentence, lacks merit. A college graduate with two years of post-graduate education and experience working as a paralegal, Miller told the court during the plea hearing that he had read and signed the plea agreement and that he understood it.[3] Plea Hearing at 9. Furthermore, he listened to the prosecutor outline the terms of the plea agreement, including the provision that Miller "waives his right to appeal any sentence that is imposed within or below the stipulated guidelines range." Petitioner had ample opportunity to express his understanding, or lack of understanding of the agreement, when Magistrate Judge Katz inquired "Mr. Miller, do you understand the terms of the agreement". Id. at 10. However, petitioner did not seek clarification of any part of the agreement and responded to Magistrate Judge Katz's question saying, "Yes, I do." Id.

The Second Circuit has stated that "a defendant's statements at his plea allocution `carry a strong presumption of verity.'" Luna, 1999 WL 767420, at *5 (quoting Blackledge v.

[3] At the time the plea agreement was negotiated, petitioner was represented by counsel. Additionally, counsel was present at both the plea and sentencing hearings.

Allison, 431 U.S. 63, 74 (1977)). Moreover, "`absent credible reasons for rejecting appellant's statements, [such statements] establish that the plea was entered knowingly and voluntarily.'" Id. (quoting United States v. Arias, 166 F.3d 1201 (2d Cir. 1998)).

Indeed, there was nothing difficult or confusing about the waiver language in the plea agreement to suggest that Miller might not have understood the consequences of his plea agreement. On the contrary, the waiver provision was explicit and straightforward: "Defendant will neither appeal, nor otherwise litigate under Title 28, United States Code, Section 2255, any sentence within or below the stipulated Sentencing range set forth above." Plea Agreement at 5-6. Cf. Tang, 214 F.3d at 368 (where an agreement lacks clarity, it requires narrow interpretation and strict construction against the Government). Furthermore, Magistrate Judge Katz said nothing during the plea hearing that contradicted the terms of the plea agreement. Cf. Chen, 127 F.3d at 289 (Magistrate Judge erroneously informed defendant that he could only appeal an illegal sentence when defendant also had a right to appeal a sentence outside the Guidelines range). Consequently, the record adequately supports the conclusion that Miller knowingly waived the right to appeal his sentence, which fell within the stipulated Guidelines range.[4]

[4] I note that effective December 1, 1999, Rule 11(c) of the Federal Rules of Criminal Procedure was amended as follows: "[B]efore accepting a plea of guilty. . . the court must address the defendant personally in open court and inform the defendant

C. Waiver Not Invalidated by Sentencing Judge's Statements

Petitioner's second claim, that this Court's statement at sentencing regarding his right to appeal invalidated his waiver, is similarly unavailing. At the conclusion of the sentence, petitioner was informed of his right to appeal. See supra Part B. This recitation was nothing more than a boilerplate statement at the conclusion of the sentencing proceedings. See Fed. R. Crim. P. 32(c)(5); United States v. Michelsen, 141 F.3d 867, 872 (8th Cir.), cert. denied, 525 U.S. 942 (1998). Despite this notification of the right to appeal, plaintiff's waiver remains valid. Statements made by a court at the sentencing hearing have no effect on a defendant's decision, made at an earlier time, to plead guilty and waive appellate rights. See United States v. Arrellano, 213 F.3d 427, 431 (8th Cir. 2000)(district court statements could not unilaterally revoke an earlier waiver); United States v. Atterberry, 144 F.3d 1299, 1301 (10th Cir. 1998).

In Tang, 2000 WL 554690, at *5, the Second Circuit urged district courts to review the terms of the plea agreement before giving an instruction regarding the right to appeal.

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of, and determine that the defendant understands. . . the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence." See also United States v. DeJesus, 99 Civ. 1499, 2000 WL 963452, at *5 n.1 (2d Cir. July 12, 2000). The purpose of this amendment is to ensure that any waiver is voluntarily and knowingly made by the defendant. Although the amendment does not apply here, the colloquy between petitioner and the Court would satisfy the Rule's requirements.

Nonetheless, the instruction here constituted, at most, harmless error in light of petitioner's unequivocal testimony that he fully understood his plea agreement and agreed to waive all rights to appeal or collaterally challenge his conviction and sentence, as long as he was sentenced within or below the stipulated Guidelines range.

Petitioner relies on United States v. Buchanan, 59 F.3d 914 (9th Cir. 1995), for the proposition that a sentencing judge's comments regarding the right to appeal can, in certain circumstances, invalidate a prior knowing and voluntary waiver. Buchanan, however, is distinguishable. In Buchanan, the defendant orally moved to withdraw his guilty plea arguing that his attorney failed to inform him of unfavorable stipulations contained in the plea agreement. Id. Given petitioner's failure to understand these stipulations, his alleged understanding of the entire plea agreement, including the waiver of the right to appeal, was suspect. The circumstances in Buchanan are strikingly different from those here, where petitioner clearly stated his understanding of the entire plea agreement. See supra Part B. In any event, Buchanan is a Ninth Circuit case which is not binding on this Court.

D. The Plea Agreement Cannot be Voided Based on a Claim of Ineffectiveness of Counsel

Petitioner argues that because his counsel was precluded under the terms of the plea agreement from seeking downward departures, he was denied effective assistance of

counsel. According to petitioner, the plea agreement was "a gag which made true advocacy impossible. There was an attorney present in the courtroom, but there was no voice, no advocate, for the defendant." Pet. Mem. at 3. While I have always believed that the plea agreement currently in use in this district is unconscionable in this regard, and have long been troubled by the bar on advocacy at sentencing,[5] I am bound to follow the controlling Second Circuit precedent. The Second Circuit emphatically rejected the argument that a waiver of the right to appeal may be invalidated on the ground that a petitioner's counsel was ineffective during sentencing because his counsel did not argue for a downward departure where the plea agreement barred him from doing so. See United States v. Djelevic, 161 F.3d 104, 106 (2d Cir. 1998). "If we were to allow a claim of ineffective assistance of counsel at sentencing as a means of circumventing plain language in a waiver agreement, the waiver of appeal provision would be rendered meaningless." Id. at 107.

However, I agree with a recent decision of Judge Robert Sweet in which he held that "a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation [or plea] agreement cannot be barred by the agreement itself–- the very product of the alleged ineffectiveness." Balbuena v. United

[5] As I stated during the petitioner's sentencing, "in the era of the Sentencing Guidelines, preventing defense counsel from seeking a downward departure, in essence, means no advocacy at all." Sentencing Hearing at 22.

States, 99 Civ. 6097, 2000 WL 776822, at *3 (S.D.N.Y. June 16, 2000)(internal quotation marks and citation omitted). Therefore, an agreement negotiated without the effective assistance of counsel cannot be knowingly rendered. Id. at *3 (petitioner argued that at the time of the plea her decision to forego judicial deportation was not knowing and voluntary because her counsel was ineffective in advising her); Luna, 1999 WL 767420, at *3 (defendant's contention that his agreement to waive right to appeal was due to ineffective assistance of counsel is construed as a claim that the waiver was not knowing and voluntary). Because a pro se petition should be read liberally, see Haines v. Kerner, 404 U.S. 519, 520 (1972), petitioner's claim of ineffective assistance of counsel cannot be limited to the assistance he received at the sentencing proceeding but must be construed to include assistance rendered at the time he entered into plea negotiations with the Government. I now turn to the question of whether petitioner's counsel was ineffective in negotiating the plea agreement at issue.

To establish ineffectiveness of counsel in the context of a plea agreement, a petitioner must show:

> (1) his attorney's performance was unreasonable under prevailing professional norms and that the challenged action was not sound strategy and (2) there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Balbuena, 2000 WL 776822, at *3 (citing Strickland v. Washington, 466 U.S. 668, 688-89, 694 (1984)). In other words, in order to

prevail on an ineffective assistance claim, "a defendant must establish that his counsel's performance was deficient and that the deficiency caused actual prejudice to his defense." United States v. DeJesus, 99 Civ. 1499, 2000 WL 963452, at *3 (2d Cir. July 12, 2000)(claim that defendant was denied effective assistance of counsel because counsel did not encourage him to plead guilty without a plea agreement and then litigate the safety valve issue, was without merit because defendant possessed a weapon). When assessing an attorney's performance under the Sixth Amendment, a court, operating with the benefit of hindsight, should not attempt to decide whether an alternative course of action might have led to a more favorable result for the petitioner. Rather, a court must determine "whether or not the course actually pursued [by the attorney] might be considered sound . . . strategy by the attorney at the time." Balbuena, 2000 WL 776822, at *4 (quoting Strickland, 466 U.S. at 689).

In his plea agreement, which he presumably signed on the advice of counsel, petitioner relinquished the right to move for a downward departure in exchange for the consolidation of all of his offenses in one court, with the possibility of a single sentence in the suggested Guidelines range of 78 to 97 months. Defense counsel's recommendation in favor of the plea agreement represented a reasonable strategic choice given the circumstances. By consolidating the New York and Washington, D.C. offenses, petitioner's counsel foreclosed any possibility that the latter sentencing court would order him to serve his

sentences consecutively. Courts have found defense attorneys to be effective when obtaining this type of benefit for their clients. See, e.g., United States v. Fanelli, 96 Civ. 736, 1997 WL 603522 at *13 (S.D.N.Y. September 29, 1997)(no ineffective assistance of counsel claim where attorney consolidated offenses from several jurisdictions into a single plea agreement and thereby avoided possible consecutive sentencing)(Sotomayor, J.), aff'd, 165 F.3d 13 (2d Cir. 1998). Because the first prong of the Strickland test has not been met, I cannot conclude that counsel was ineffective.

III. CONCLUSION

Plaintiff's motion to vacate his sentence is denied. The Clerk of the Court is directed to close this case.

SO ORDERED:

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Shira A. Scheindlin
U.S.D.J.

DATED: New York, New York
July 26, 2000

Appearances

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